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Edward J. Milbrada 40,090
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Signature of Agent

Case 6900R

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE BOARD OF PATENT APPEALS AND INTERFERENCES

In the Application of :
TERRILL A. YOUNG, ET AL. :
Serial No. 09/398,842 : Group Art Unit 3761
Filed September 17, 1999 : Examiner J. Webb
For: ABSORBENT ARTICLES HAVING :
CUFFS WITH SKIN CARE :
COMPOSITION DISPOSED THEREON :

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BRIEF ON APPEALS

Box AF
Commissioner for Patents
Washington, D.C. 20231

Dear Sir:

Enclosed, pursuant to 37 C.F.R. 1.192(a), is Appellant's brief on Appeal for the above application. The Brief is being forwarded in triplicate.

Please charge the fee of \$320.00 pursuant to 37 C.F.R. 1.17(c) to Deposit Account No. 16-2480 for the filing of the brief in support of an appeal. The Commissioner is also authorized to charge any additional fees with may be required to this account. A duplicate copy of this sheet is enclosed.

Respectfully submitted,

For: Terrill A. Young et al.

By Edward J. Milbrada
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Date: March 7, 2003

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APPEAL BRIEF

Box AF
Commissioner for Patents
Washington, D.C. 20231

Dear Sir:

This is a Brief on Appeal of currently pending Claims 1-3 and 5-20 of the above-identified application. These claims were finally rejected in an Office Action dated November 7, 2002. A Notice of Appeal was mailed on January 3, 2003. As described at MPEP § 1206, this Brief is being filed in triplicate within two months of the Office date of receipt of the Notice of Appeal (January 8, 2003). Authorization is given to charge any fees required under 37 CFR § 1.17 related to this appeal to Deposit Account No. 16-2480.

REAL PARTY IN INTEREST

The Appellants who are named in the caption of the brief have assigned this application to the Procter & Gamble Company.

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RELATED APPEALS AND INTERFERENCES

Appellants, Appellants' legal representative, and the assignee are not aware of any interferences or appeals which would be directly affected by or have a bearing on the Board's decision in the pending appeal.

STATUS OF CLAIMS

Claims 1-3 and 5-20 are currently pending. Claims 1-3 and 5-20 were finally rejected by an Office Action mailed on November 7, 2002. Claim 4 has been cancelled.

The rejection of Claims 1-3 and 5-20 is being appealed. A copy of Claims 1-3 and 5-20 on appeal appears in the attached Appendix A.

STATUS OF AMENDMENTS

No amendments have been filed subsequent to the Examiner's final rejection of Claims 1-3 and 5-20.

SUMMARY OF THE INVENTION

The claimed invention relates to an absorbent article. The absorbent article has a chassis that includes a backsheet (page 7, line 32) and a liquid pervious topsheet joined to the backsheet (page 7, lines 30-32). The absorbent article also has an absorbent core positioned between the topsheet and the backsheet (page 7, line 33).

A cuff is also joined to the chassis (ref number 62 in Figures 1, 3, and 7, page 17, lines 4-11). Each cuff comprises a nonwoven material that consists essentially of metallocene polypropylene spunbond fibers (page 18, lines 6-16 and page 18, line 34-page 19, line 5) where the fibers are less than about 1.3 denier (page 18, lines 17-26). The nonwoven also resists a hydrostatic head of at least about 85 mm (page 19, lines 23-36).

Other claimed embodiments of this absorbent article include:

- A cuff consisting of spunbond fibers (page 18, line 34 - page 19, line 5).
- The nonwoven has a basis weight of less than about 17 gsm (page 18, lines 23-25, page 19, lines 29-31).
- The nonwoven can comprise small amounts (<10%, <8%) of meltblown fibers with a hydrohead of at least 85 mm (page 19, lines 23-36).

- A skin care composition can be disposed on one or more cuffs with (applied on or migratable to) the body surface of the cuffs (page 12, lines 4-29). The skin care compositions are readily transferable to the wearer's skin (page 12, lines 5 and 6). The skin care compositions comprise an emollient (page 39, lines 8-15) and an immobilizing agent (page 43, lines 4-8) and is solid or semi-solid at 20°C (37, lines 33 and 34). The composition can comprise specific materials (page 39, line 16 to page 42, line 13 and page 43, line 17 to page 47, line 13).

ISSUES

1. Whether Claims 1-3 and 5-20 were properly rejected under 35 USC §103(a) as being unpatentable over Roe et al. (6,120,783) in view of Gillespie et al. (5,783,503) and Shultz et al. (6,103,647).
2. Whether Claims 1-2, 5, 6, and 17-19 were properly rejected under 35 USC §103(a) over Lawson (4,695,278) in view of Gillespie et al. (5,783,503) and Shultz et al. (6,103,647).

GROUPING OF CLAIMS

The claims stand and fall together with respect to both Issues 1 and 2.

ARGUMENTS

Issue 1: Whether Claims 1-3 and 5-20 were properly rejected under 35 USC §103(a) as being unpatentable over Roe (6,120,783) in view of Gillespie et al. (5,783,503) and Shultz et al. (6,103,647).

The Appellants respectfully submit that the Examiner has ignored, contrary to MPEP § 2141.02 ("A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention."), a key principle of operation, contrary to MPEP § 2143.01, of one of the cited references and, as a result, has improperly maintained the rejection of Claims 1-3 and 5-20 as being unpatentable over Roe et al. (6,120,783) in view of Gillespie et al. (5,783,503) and Shultz et al. (6,103,647). Specifically:

- The Examiner admits that Roe fails to disclose both 1) the use of barrier cuffs of spunbond nonwoven materials made from polypropylene fibers that are less than 1.3 denier and 2) that the polypropylene resin used to produce the fibers is made using a metallocene catalyst (i.e., metallocene propylene).

- The Examiner attempts to correct the first deficiency in Roe by asserting that the Gillespie reference teaches the use of microdenier fibers with a denier in the range from 0.1-0.3 that can be made from polypropylene. The Examiner further asserts that it would have been obvious to combine the Gillespie reference with the Roe patent "...in order to produce nonwovens of surprising strength, barrier and cover."
- The Examiner attempts to correct the second deficiency in Roe by asserting that Schultz discloses the use of metallocene polypropylenes that can be developed by spunbonding and further asserting that it would have been obvious to use metallocene fibers in the polypropylene fibers of Roe and Gillespie to provide a fabric that has an excellent barrier, breathability and a pleasing hand.

The Examiner has maintained this same combination using essentially the same arguments over the last two Office Actions, including the current final rejection.

The following is the relevant portion of Claim 1 as amended:

...said cuff comprising **a nonwoven consisting essentially of metallocene propylene spunbond fibers** (emphasis added) having a denier less than about 1.3 and wherein said nonwoven has a hydrostatic head of at least about 85 mm.

In response to the Appellants' arguments that the cited combination fails to teach or disclose a nonwoven that consists essentially of metallocene polypropylene spunbond fibers of less than about 1.3 denier (see page 2, lines 15-19 of the response mailed on August 21, 2002), the Examiner has ignored the fact that a plain reading (MPEP § 2111.01) of the claims says that the **fibers** consist essentially of metallocene polypropylene and has continued to misapply the Gillespie reference in the cited combination. Specifically, the Examiner continues to assert that: "Gillespie discloses the use of micro-denier fibers of 0.1-0.3 denier, which provides a nonwoven with excellent barrier cover and strength." This application of the Gillespie reference is improper for at least the following reasons.

The Examiner Improperly Associated the Transition Phrase: "Consisting Essentially Of"

Instead of properly associating the transitional phrase "consisting essentially of" with the composition of the fibers where the claimed composition materially affects the basic and novel condition of the claimed invention (MPEP § 2111.03), the Examiner improperly associates it with the type of nonwoven and states that "...as long as one of the nonwovens is essentially

spunbond, then the claim limitation is satisfied.” (Office Action mailed November 7, 2002 at paragraph 32)

The Appellants submit that the composition of the fibers materially affects the basic and novel conditions of the claimed invention because the cited combination fails to teach or disclose a spunbonded nonwoven where all of the fibers are both made using metallocene polypropylene and are less than about 1.3 denier. The only way Gillespie achieves 0.1 to 0.3 denier fibers is to extrude larger fibers (no diameter for the extruded fibers is disclosed in the Gillespie reference) that are made out of at least two different polymers and splitting the larger fibers into the smaller ones (Fig. 1 and col. 4, lines 15-24 and col. 4, lines 54-59). In other words, the combination cited in finally rejecting of Claims 1-3 and 5-20 would be made up of a fibrous blend containing both metallocene polypropylene fibers and fibers of another thermoplastic polymer where both types of fibers are between about 0.1 and 0.3 denier. Such a blended structure is materially different than the claimed single component structure.

The Examiner Improperly Changes the Principle of Operation of a Cited Reference

The Appellants further submit that the rejection was improper because the combination cited by the Examiner changes the principle of operation of the Gillespie reference (MPEP § 2143.01). Elimination of Gillespie’s multicomponent filaments, when such a multicomponent structure is necessary for the for the formation of Gillespie’s micro-denier fibers, means that the cited combination would not have fibers that are less than about 1.3 denier. In other words, the cited combination fails to teach or disclose a nonwoven, such as the claimed structure, where all of the fibers are both made up of a single component and are less than 1.3 denier because the combination does not teach how the claimed structure is achieved without the use of multicomponent filaments. Specifically, at col. 4, lines 17-24, the Gillespie reference states:

The multicomponent filament of FIG. 1 is a bicomponent filament in a “segmented pie” configuration having eight pie shaped wedges of two different thermoplastic polymeric components 22 and 24 arranged in alternating segments about a hollow core 26. No areas of like components touch in the hollow core embodiment , so there are no areas of adhesion between like component segments.

Thus, a fiber consisting essentially of metallocene cannot be a multicomponent filament and the principle of operation of the Gillespie reference requires multicomponent filaments to achieve a 0.1-0.3 denier fiber.

In summary, the Appellants have shown above:

- that the Examiner misassociated the transitional phrase “consisting essentially of” with the type of nonwoven structure instead of with composition of the fibers where the composition materially affects the basic and novel condition of the claimed invention in contravention of MPEP § 2111.03;
- that the Examiner improperly failed to consider all of the teachings of the prior art in contravention of MPEP § 2141.02; and
- that the Examiner improperly ignored a key principle of operation in contravention of MPEP § 2143.01

while maintaining the rejection of Claims 1-3 and 5-20 over Roe et al. (6,120,783) in view of Gillespie et al. (5,783,503) and Shultz et al. (6,103,647). Therefore, the Appellants respectfully request that the Board reverse the rejection of Claims 1-3 and 5-20 under 35 USC § 103 (a).

2. Whether Claims 1, 2, 5, 6, and 17-19 were properly rejected under 35 USC. §103(a) as being unpatentable over Lawson (4,695,278) in view of Gillespie et al. (5,783,503) and Shultz et al. (6,103,647).

As with the rejection over Roe et al. in view of Gillespie et al. and Shultz et al. as discussed with respect to Issue 1, the Appellants submit that a rejection over Lawson (4,695,278) in view of Gillespie et al. (5,783,503) and Shultz et al. (6,103,647) is also improper because the Examiner again misapplied the Gillespie reference in contravention of the following sections of the MPEP:

- 2111.03: “The transitional phrase “consisting essentially of” limits the scope of a claim to the specified materials or steps “and those that do not materially affect the basic and novel characteristic(s)” of the claimed invention.”
- 2141.02: “A prior art reference must be considered in its entirety, i.e., as a whole, including portions that would lead away from the claimed invention.”
- 2143.01: “If the proposed modification or combination of the prior art would change the principle of operation of the prior art invention being modified, then the teachings of the references are not sufficient to render the claims prima facie obvious.”

while maintaining the rejection of Claims 1, 2, 5, 6, and 17-19. Specifically, the cited combination still relies on the Gillespie reference for fibers that are less than 1.3 denier and the arguments presented above with respect to Issue 1 are equally applicable with respect to Issue 2. In other

words, the cited combination of Lawson, Gillespie et al. and Shultz et al. still fails to teach or disclose the claimed structure:

...said cuff comprising **a nonwoven consisting essentially of metallocene propylene spunbond fibers** (emphasis added) having a denier less than about 1.3 and wherein said nonwoven has a hydrostatic head of at least about 85 mm.

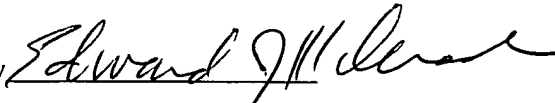
Accordingly, Appellants request that the Board reverse the Examiner's rejection of Claims 1, 2, 5, 6, and 17-19.

SUMMARY

The Appellants submit that they have shown that the Examiner's final rejection of Claims 1-3 and 5-20 was improper and that the claims are unobvious over the cited art. Accordingly, the Appellants respectfully request that the Board of Patent Appeals and Interferences reverse the Examiner's final rejection under 35 USC § 103 (a) and remand with directions to allow all of the pending claims of the present application.

Respectfully submitted,

For: Terrill A. Young et al.

By 

Edward J. Milbrada
Agent for Appellant(s)
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(513) 626-1167

Date: March 7, 2003

Customer No. 27752

Appendix A

1. An absorbent article to be worn by a wearer adjacent the skin, the absorbent article comprising:
a chassis comprising:
an outer covering layer comprising:
a backsheet; and
a liquid pervious topsheet joined to said backsheet; and
an absorbent core positioned between said topsheet and said backsheet;
a cuff joined to said chassis, each said cuff having a first surface and a second surface disposed opposite said first surface, said cuff comprising a nonwoven consisting essentially of metallocene propylene spunbond fibers having a denier less than about 1.3 and wherein said nonwoven has a hydrostatic head of at least about 85 mm.
2. The absorbent article of Claim 1 wherein said nonwoven consists of spunbond fibers.
3. The absorbent article of Claim 2 wherein said nonwoven has a basis weight of less than about 17 gsm.
5. The absorbent article of Claim 1 wherein said nonwoven comprises less than about 10 % by weight meltblown fibers and said nonwoven has a hydrohead of at least about 85 mm.
6. The absorbent article of Claim 5 wherein said nonwoven comprises less than about 8 % by weight meltblown fibers.
7. The absorbent article of Claim 1 wherein said cuff further comprises an effective amount of a skin care composition disposed on said nonwoven said skin care composition being semi-solid or solid at 20°C and at least partially transferable to a wearer's skin.

8. The absorbent article of Claim 7 wherein the quantity of said skin care composition on said nonwoven ranges from about 0.05 mg/in² to about 80 mg/in².
9. The absorbent article of Claim 7 wherein said skin care composition comprises:
 - (i) from about 10% to about 95% of an emollient having a plastic or fluid consistency at 20°C; and
 - (ii) from about 5% to about 90% of an agent capable of immobilizing said emollient on said nonwoven.
10. The absorbent article of Claim 9 wherein said emollient comprises a member selected from the group consisting of petroleum-based emollients, fatty acid ester emollients, polysiloxane emollients, sucrose ester fatty acids, alkyl ethoxylates emollients and mixtures thereof.
11. The absorbent article of Claim 9 wherein said immobilizing agent is selected from the group consisting of polyhydroxy fatty acid esters, polyhydroxy fatty acid amides, C₁₄-C₂₂ fatty alcohols, C₁₂-C₂₂ fatty acids, C₁₂-C₂₂ fatty alcohol ethoxylates, and mixtures thereof.
12. The absorbent article of Claim 7 wherein said skin care composition further comprises aloe extract.
13. The absorbent article of Claim 7 wherein said skin care composition is disposed on said first surface.
14. The absorbent article of Claim 13 wherein said first surface of said cuff contacts the wearer's skin during use so as to form a body surface.
15. The absorbent article of Claim 13 wherein said first surface comprises the surface facing away from the wearer during use so as to form a garment surface.
16. The absorbent article of Claim 13 wherein said skin care composition is capable of being transferred from said first surface to said second surface.

17. The absorbent article of Claim 1 wherein said cuff comprises a gasketting cuff comprising a side flap formed from a portion of said topsheet and an elastic member operatively joined to said side flap.
18. The absorbent article of Claim 1 wherein said cuff comprises a barrier cuff that is formed unitarily with said topsheet.
19. An absorbent article to be worn by a wearer adjacent the skin, the absorbent article comprising:
 - a chassis having edges, said chassis comprising:
 - an outer covering layer; and
 - an absorbent core encased in said outer covering layer;
 - a barrier cuff joined to said chassis, said barrier cuff comprising a separate barrier cuff member having a proximal edge and a distal edge in spaced relation to said proximal edge, said proximal edge being joined to said outer covering layer, a portion of said distal edge not being secured to the absorbent article, and a spacing elastic element operatively associated with said distal edge for allowing said barrier cuff member to stand upwardly away from said outer covering layer, said barrier cuff member comprising a nonwoven consisting essentially of metallocene polypropylene spunbond fibers having a denier less than about 1.3 and wherein said nonwoven has a hydrostatic head of at least about 85 mm.
20. An absorbent article to be worn by a wearer adjacent the skin, the absorbent article comprising:
 - a chassis having edges, said chassis comprising:
 - an outer covering layer; and
 - an absorbent core encased in said outer covering layer;
 - a barrier cuff joined to said chassis, said barrier cuff comprising a separate barrier cuff member having a proximal edge and a distal edge in spaced relation to said

proximal edge, said proximal edge being joined to said outer covering layer, a portion of said distal edge not being secured to the absorbent article, and a spacing elastic element operatively associated with said distal edge for allowing said barrier cuff member to stand upwardly away from said outer covering layer, said barrier cuff comprising a nonwoven consisting essentially of metallocene polypropylene spunbond fibers having a denier less than about 1.3 and wherein said nonwoven has a hydrostatic head of at least about 85 mm; and

an effective amount of a skin care composition disposed on said barrier cuff member, said skin care composition being semi-solid or solid at 20°C and at least partially transferable to a wearer's skin.